In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE OREGON AND CALIFORNIA RAILROAD Company, appellant, *v.* THE UNITED STATES, APPELLEE. } No. 188.

APPEAL FROM THE UNITED ST TES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEE.

The distinction is attempted between this case, involving a donation claim, and Nos. 186 and 187 involving preemption and homestead claims.

This distinction does not seem to have appealed to either of the courts below, and, while ingeniously argued in the brief of counsel, seems to be not altogether clear.

The plea of the defendants below alleged that Hines, the donation claimant, abandoned the land without having paid for it or resided thereon four years, and that he was not residing thereon at the time the defendants selected the same, as aforesaid—that is, in 1871.

The assignment of errors and brief of appellant puts the construction upon the plea that the land was abandoned prior to defendant's selection, although the plea does not say when the defendant moved away from the land; and the assignment of errors contends that the proper officers of the United States should have canceled the donation notification prior to such selection, and that the approval of the defendant's selection was in fact the canceling of the donation notification.

The plea itself is not very distinct as to what is meant, but assuming that at sometime prior to 1871 John W. Hines moved away from the land, continuing to claim it and intending to reside upon it for four years, or to reside upon it for one year and pay for it, or that he had already resided upon it one year and intended to pay, but had not as yet paid for it, it would seem that in any of these suppositions this was not public land open to selection and patenting in disregard of his rights.

It is to be remembered that the bill alleges that the error or mistake in the proceeding by the Secretary was that the Secretary was in ignorance "of the adverse claim of John W. Hines" when patenting the land to the company in 1871.

It can not, therefore, be argued that he passed upon and rejected that claim in the process of approving and patenting the land to the company.

The bill also alleges that the land was "not public land subject to the grant."

As we have nothing but the allegations of the bill and plea, it is to be taken for true, we suppose, as thus implied in the bill, that Hines was making a claim when the patent was issued, in spite of his departure from the land as alleged in the plea. It does not appear that he has ceased to claim, and the fact that the Attorney-General has brought suit would seem to suffice to show that he has not, or that, somehow, the cancellation of the patent would not be useless to him or a successor to him. We shall not travel out of the record to explain what the real fact is.

The act here in question grants to the railroad company "every alternate section of *public* lands, *not mineral*, designated by odd numbers, to the number of twenty alternate sections per mile," and provides that when any of said sections "shall be found to have been granted, other lands, *designated as aforesaid*, shall be selected by said companies in lieu thereof * * * in alternate sections, designated by odd numbers as aforesaid," and not more than 10 miles beyond place limits.

It is evident that "other lands designated as aforesaid" refers to "public lands, not mineral." That is the only logical construction to be placed upon it. It could refer to but one other thing, and that is "designated by odd numbers to the number of twenty alternate sections per mile." It does not refer to that, because the act proceeds by saying "in alternate sections designated by odd numbers as aforesaid." The ordinary grammatical meaning should be placed upon the acts of Congress.

It is not likely the intention of Congress was to allow lieu selections with any more freedom than acquiring title to place lands. And when, in order to put such a construction upon its language, we must say that Congress was guilty of such a tautological expression of its intent as would be necessary to imply such an intention, we certainly do violence to what one might reasonably suppose Congress to have had in mind.

Certainly there was no intention that mineral lands could be selected as indemnity. Then none other than *public* lands could be so selected. Whether public as of date of grant, of definite location, of selection or of patent is not important here, because the same donation claim existed at each of those events.

The inquiry, then, is whether or not land subject to a valid donation notification made in 1853 was public land ten or fifteen years later.

The act of 1894 indicates what Congress then thought of it. This act was passed for the express purpose of restoring just such lands to the public domain. Such lands were not even at the passage of that act *public lands*. Had they been there would have been no necessity for its passage.

The practice of the Land Department was to treat these as other than public lands. A new entry was not allowed without a contest, and such claims were held to be excepted from grants of *public* land to railroad companies, though not mentioned in excepting clauses. (*Oregon* v. *Cal. R. R.* v. *Kuebel*, 22 L. D., 308; *Dyer* v. *Oregon & C. R. R. Co.*, 23 L. D., 569.)

Such interpretation of the law by the Interior Department will not be disturbed unless plainly erroneous.

Clearly the lieu selections were to be of "public lands." These words have come to have a very definite meaning. They have been the subject of frequent judicial inquiry in this and other courts.

In *Newhall* v. *Sanger* (92 U. S., 763) this court held that lands within the limits of an alleged Mexican or Spanish grant which was *sub judice* at time of withdrawal of lands are not embraced by a grant of public land, and said:

> The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.

And in *Bardon* v. *Northern Pacific* (145 U. S., 538), Mr. Justice Field, delivering the opinion of the court, said:

> The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land to which any claims or rights of others have attached does not fall within the designation of public land.

The tract here in question was certainly neither subject to entry under the general laws at the time when defendant's rights attached nor free from all claims and rights.

The donation act does not prescribe any limit within which proof of continued residence must be made.

Section 4 provides "that there shall be, and hereby is, granted to every white settler * * * who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act * * *."

And section 7, after providing for proof of commencement of settlement (which was made in this case), continues: "And *at any time after* the expiration of four years from the date of settlement * * * shall prove in like manner * * * the fact of continued residence and cultivation required by the fourth section of this act."

"At any time after" would have been going on to this day had not the statute of limitations of 1894 come in and put a stop to it. At any time prior to 1896 proof might have been made which would entitle Hines to a patent. The record does not show whether it was made or not.

The act does not say that the four continuous years of residence must be begun at time of settlement. It does say that proof of such residence may be made at any time after four years. When we remember the liberality with which settlers upon the public domain should always be dealt with, can we say that a provision requiring the four years of residence to begin immediately upon settlement should be injected into the act? Congress evidently intended to deal leniently with the donees. That intention should be furthered rather than limited. The four years of residence were to be "consecutive years"—there was no other require-

ment. Hines, it would seem, may have left the land, relying upon the Oregon decisions about the donation act being a grant *in presenti* with condition subsequent, and, without need for any new notification, have returned and resided four years or one year, with a money payment.

But let it be admitted, for the sake of argument, that the conditions on which the donation was made had to be and had not been complied with prior to 1870; that Hines had gone away from the land and was not then residing on it—in spite of all this, the land was not free public land. There was, nevertheless, a *claim*, and until 1880, when this court decided *Hall* v. *Russell*, what the courts themselves regarded as a *valid* claim and even a *good title* in Hines. (See *Lee* v. *Summers*, 2 Or., 266; *Blaksley* v. *Caywood*, 4 Or., 279; *Chapman* v. *School District*, 1 Deady, etc.) That is to say, the donation law was held to be a grant of the fee *in presenti* to the settler on conditions subsequent. Of a breach of such conditions subsequent only the Government could take advantage by some forfeiture proceeding. And of a late or deficient compliance with them only the Government could complain. Can it be said that there was not even a claim to the land in 1870, because long after, in 1880, *Hall* v. *Russell* was decided?

Respectfully submitted.

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